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MAY 03 2005

**BEFORE THE
ENVIRONMENTAL QUALITY COUNCIL
STATE OF WYOMING**

Terri A. Lorenzon, Director
Environmental Quality Council

IN THE MATTER OF THE APPEAL AND REVIEW OF)
THE DECISION REGARDING THE RECLASSIFICATION)
OF EIGHT MAIN STREAM DRAINAGES TO POWDER)
RIVER AND OTHER TRIBUTARIES IN THE)
POWDER RIVER BASIN, DATED DECEMBER 22, 2004)

Docket No. 05-3203

PETITIONERS' OPPOSITION TO MOTION TO DISMISS BY INTERVENOR

COME NOW the Petitioners, by and through their undersigned attorney, and hereby respond to the Intervenor's motion to dismiss as follows:

1.

The motion to dismiss by the Intervenor, Kennedy Oil, is transparently based on two fictions: (1) that the "final action" of the Administrator occurred prior to his decision; and (2) that there are more than sixty (60) days between December 27, 2004, and February 24, 2005. Neither of those two things are true, correct or possibly asserted in good faith.

2.

It is the universal principle of appellate law that actions are appealable from the final actions of the agency. "Final action" is defined in Chapter 1, Section 16 of the Environmental Quality Council's Rules of Procedure, Subsection A, which provides in part: "... appeals to council from final actions of the administrators or director shall be made within 60 days of such action." (Emphasis supplied.) The question is not what date the instrument describes on the top of the decision, but when did the "action" take place. The action is the Administrator's decision. That is the final action. The final action was clearly on December 27, 2004, when the Administrator signed the decision. The rule requires an appeal within sixty (60) days of such action. The attempt by the intervenor to place a date

prior to the action of the Administrator under the rule is not only outside of the definition of the rule cited by the Intervenor, but unprecedented in case law.

3.

Whether the appeal was made within sixty (60) days is answered by simple math. If the final action was taken on December 27, 2004, (and even counting the 27th as one of the days, even though the rules provide for commencement "within" meaning "after"), there would be five (5) days in December; and thirty-one (31) days in January, meaning February 24, 2005, would be sixty (60) days.

4.

W.R.C.P. Rule 6 provides as follows:

In computing any period of time prescribed or allowed by these rules, by order of court, or by any applicable statutes, the day of the act, event, or default from which the designated period of time begins to run shall not be included.... (Emphasis supplied.)

The Wyoming Rules of Civil Procedure are made applicable to this proceeding by Chapter 2, Section 14, EQC Rules.

5.

As indicated in the motion to dismiss, Petitioners' appeal was filed on February 24, 2005, by facsimile to the Environmental Quality Council, even though it would have been due on February 25, 2005, if December 27, 2004, is not included in the totaling of the days in the appeal time. In any event, February 24, 2005, was certainly the date upon which the appeal could be filed and was filed.

6.

Intervenor's motion to dismiss is not warranted in the law, nor is it supported by any facts. The motion should be denied.

DATED this 2nd day of May, 2005.

KIRVEN and KIRVEN, P.C.:

By 
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CERTIFICATE OF SERVICE

I, **DENNIS M. KIRVEN**, of Kirven and Kirven, P.C., attorneys for Petitioners, certify that I served a true and correct copy of the foregoing "Petitioners' Opposition to Motion to Dismiss by Intervenor" as follows:

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on the 2nd day of May, 2005.


DENNIS M. KIRVEN